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Statute of Frauds Sufficiency of Memorandum

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T H E S I S .

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S T A T U T E O F F R A U D S .
S U F F I C I E N C Y O F M E M O R A N D U M .

Harry Leland Smith.

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CORNELL UNIVERSITY - SCHOOL OF LAW.

1889.

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Argus Co. v. Albany 55 N.Y. 495.
Mason v. Decker 72 N.Y. 595.

INTRODUCTION.

Of all branches of the law there is probably not one in which judicial legislation has been more vigorously indulged than in the construction and application of the statute of frauds, which to the ordinary mind seems so plain as to be incapable of misconstruction. The amount of litigation arising under it has been enormous and the number of cases which have been before the courts for decision can hardly be computed, and now, after the lapse of two centuries since its enactment many questions pertaining to it are not definitely settled.

The parliament of the Mother country enacted this important statute, entitled, "An Act for the Prevention of Frauds and Perjuries" just one hundred years prior to the Declaration of our National Independence. It is quite unknown outside of the British Empire and the United States.

It originated in the earnest desire of eminent English jurists, principal among the number, Lord Hale, to prevent the numerous frauds and perjuries which were perpetrated

by means of suborned and perjured witnesses; the most effectual way of doing this was to require a large number of the most common contracts to be reduced to writing and signed by the party whom it sought to charge.

The principle object of the statute was to exclude oral testimony in certain cases where experience had shown that it was peculiarly liable to abuse. At the time when the statute went into ^{operation} ~~operation~~ there was no rule of the common law requiring any executory contract to be manifested by a writing or any other evidence than that of mere words.

Professor Greenleaf says, (Greenleaf on Evidence), " This statute introduced no new principle into the law; it was new in England only in the mode of proof which it required. Some protective regulations may be found in some of the early codes of most of the Northern nations as well as in the laws of the Anglo Saxon princes. In the Anglo Saxon law such regulations were quite familiar and the statute of frauds was merely the revival of absolute provisions demanded by the circumstances of the times and adopted in a new mode of proof to the conditions and habits of the trading community. The statute left the common law untouched in all respects except where it expressly provided a different

rule."

It has always been doubted by wise lawyers and judges whether this statute has not caused and protected as many frauds as it has prevented. But the same reasons which led to its enactment has always produced a prevailing belief that on the whole it is useful.

The 17th. section of the statute of frauds is in the following words: "And be it enacted that from and after the said four and twentieth day of June A.D. 1677; no contract for the sale of any goods, wares and merchandizes, for the price of 10[£] or upwards shall^{be} allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts or their agents thereunto lawfully authorized."

With only slight amendments this statute has been enacted in all of our states with perhaps one or two exceptions. It came subsequently to the settlement of the earlier American colonies, therefore it was not adopted as part of the common law but most of the states have patterned after it

and have in substance enacted the same statute.

MEMORANDUM.

Its Form.

The form in which the memorandum is written is immaterial providing it contains all the requisite elements of a contract. Any instrument which describes the property sold, the price to be paid therefor, if the price has been agreed upon, the parties and the essential terms of the agreement, either by its own terms or by reference to other writings, if the reference is so clear that it will not be necessary to have recourse to parol evidence to explain or establish it, is as valid and binding as the most formal instrument which could be constructed. It is not necessary that the memorandum should be contemporaneous with the contract but it is sufficient if it has been made at any time afterwards and then, anything under the hand of the party sought to be charged admitting that he had entered into the

agreement will be sufficient to satisfy the statute, which was only intended to protect parties from having parol agreements imposed upon them. The statute does not require the contract itself shall be in writing but that it shall be evidenced by a writing under the hand of the party to be charged.

The court said in Townsend v. Hargraves, 118 Mass. 325. "The purpose of this celebrated enactment as declared in the preamble and gathered from all its provisions, is to prevent frauds and falsehood by requiring a party who seeks to enforce an oral contract in court, to produce as additional evidence some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal unless certain formalities are observed. If executed the effect of its performance on the rights of the parties is not changed and the consideration may be recovered."

In Bailey v. Ogden 3 John. 399 an entry was made by the vendor of sugars in his book of sales, of the name of the purchaser and the terms of the contract of sale, which was read to the agent of the vendee who made the purchase and as-

sented to by him as correct. This was held not to be a sufficient memorandum in writing, it not being signed by the party to be charged.

Kent, Chancellor said, "The form of the memorandum of the bargain is not material but it must state the contract with reasonable certainty, so that, the substance of it can be understood from the writing itself without having recourse to parol proof."

Consideration.

In Wain v. Walters 5 East 10. which was a promise to pay the debt of a third person but where the consideration for the promise was not stated in writing, it was held that parol proof of the consideration was inadmissible under the statute and the promise was therefore void. The American authorities are out of harmony as to the necessity of expressing the consideration. The statutes of some states require that the consideration be expressed in the note or memorandum of sale while in others it specially provides that it need not be expressed. The courts of New York previous to the amendment of the statute in 1863 which struck out the clause requiring the consideration to be expressed, ruled

that the memorandum must contain the whole agreement and all its material terms and conditions and followed the case of *Wain v. Walters* . But the change of 1863 has given rise to a new question and bred in the courts a wide difference of opinion.

In *Speyers v. Lambert* 6 Abb. N.S. the General Term held, that the amendment had the effect to make it wholly unnecessary for any statement of the consideration.

The contrary was held in *Castile v. Beardsely* 10 Hun 343. Thus the law in New York state awaits the action of the Court of Appeals for a final determination of this point.

Judge Finch argues in *Drake v. Seaman* 97 N.Y. 232 that the amendment of 1863 had the effect of restoring the law as it was before the words were inserted and that the consideration must appear in the agreement. If we were to judge from the dictum in this case, we could easily conclude what would be the final decision of the court upon the this point, but a better and more logical conclusion would seem to be, that the legislature when it enacted this statute intended to embody the whole common law on the subject of consideration, as it existed, in the statute and the result of the amendment of 1863 was to repeal the clause requiring the consid-

eration to be expressed, which repeat had the effect to abrogate the law as it previously existed under the statute and not to restore it, as it existed in *Wain v. Walters*.

It may be stated as a general rule that unless the statute expressly requires it no consideration need be expressed in the memorandum of sale.

Price.

If any price is actually agreed upon, when the verbal contract is entered into and it is of the essence of the contract it must be embodied in the memorandum but if the verbal contract is silent as to the price then it is not necessary, that it should be stated in the memorandum. A contract providing that the price shall be fixed by appraisers or any other method will be sufficient.

In *Hoadley v. M'Lane* the defendant gave plaintiff an order for a handsome laudulet. Nothing was said about the price. Tindal Ch. J. said, "This is a contract which is silent as to price and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Parke J. said, "It is only necessary that price should be mentioned when price is one of the ingredients of

the bargain and it is admitted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, it is insufficient."

Parties to the Agreement.

In order that there may be a binding contract it is necessary that both buyer and seller should be named or sufficiently described in the instrument. If the writing shows by description with whom the bargain was made then the statute is satisfied and parol evidence is admissible to supply the description. If one party is not designated at all plainly the whole contract is not in writing for it "takes two to make a bargain."

In Champion v. Plummer 3 B&P 252 the plaintiff by his agent wrote down in a memorandum book, the terms of the sale to him by the defendant, and the defendant signed the writing but the words were simply "Bought of W. Plummer &c" with no name of the person who bought. Sir Mansfield C.J. said, "How^{can} that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other pers-

on as well as to the plaintiff."

Subject Matter.

The subject matter of the contract, or in other words, the name of the article of sale, must be sufficiently stated in the memorandum that the property may be identified without the aid from parol evidence. A reference may be made to other papers, which if taken together, render the description clear and definite will suffice. It is not necessary that the agreement should contain a very accurate description of the property to be sold, as parol evidence is admissible to identify it where the note or memorandum contains sufficient data to apply the description to the subject matter. If it does not contain either in itself or by reference to some other writing the means of identifying the property, it is insufficient.

In Clark v. Chamberlain 102 Mass. 204, the memorandum of sale simply described the land as lots number one and two. Morton J. said, "The insuperable deficiency in the plaintiff's case is that the memorandum in writing does not contain a description of the premises sold to sufficiently satisfy the statute of frauds. It does not in itself or

by reference to other writings contain the means of identifying the premises. It shows that the defendant agreed to purchase a part of a large tract of land owned by the plaintiff but furnishes no means of determining what or how large a part.

Credit. .

All the terms and conditions of the contract must appear in the memorandum. If there is a reference to other papers which contains the terms of the contract and the reference is so clear that the whole contract can be ascertained without the aid of extrinsic evidence in explanation the memorandum is sufficient.

In O'Donnell V. Leeman 43 Maine 158, the defendant sold a dwelling house to the plaintiff at auction, upon certain specified terms and conditions. According to the alleged contract the price to be paid was \$1200. one third cash down, and the residue in equal payments in and one and two years. The memorandum of sale failed to state the terms of payment. It was attempted at the trial to show the terms of payment by the introduction of certain handbills and newspaper notices, which were exhibited at the time of

the sale. It was held that where no terms of payment are stated in a contract the money must be paid in a reasonable time.

Collateral Papers.

The memorandum may consist of several papers as well as one and if they contain the complete bargain they form together such a memorandum as will satisfy the statute. In such a case the papers ^{must} have a clear reference to one another, in order that the court may construe all of them together without the aid of extrinsic evidence.

In Western Union Tel. Co. V. Chicago & c R.R.CO. 86 Ill. 246, a written contract existed between the parties for the building and operating of a telegraph line, the memorandum was signed by the telegraph company and a copy of it sent to the rail road company, which accepted it by a letter of its agent but did not sign the contract. Held that the letter of acceptance in which the contract was clearly referred to showed the assent, and that the contract was complete within the statute.

In Talman V. Franklin 14 N.Y. 584, it was held that a document was made a part of a memorandum by being fastened

to it by a pin.

But if it be necessary to adduce parol evidence in order to connect a signed paper with others then the several papers do not constitute a memorandum in writing of the bargain so as to satisfy the statute. If the reference is ambiguous parol evidence will be admitted to explain the ambiguity.

In Long V. Miller 4 C.P. 450, Thesiger, J. said, "When it is proposed to prove the existence of a contract by several documents it must appear upon the face of the instrument signed by the party to be charged, that reference is made to another document and this omission cannot be supplied by verbal evidence. If however it appears from the instrument that another document is referred to that document may be identified by verbal evidence. A simple illustration of this rule is given in Ridgeway V. Horton; there 'instructions' were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application as to latent ambiguity."

... The authorities are harmonious in maintaining these

principles.

Letters to a Third Person.

The note or memorandum required by the statute need not pass between the parties but may be addressed to a third person. If it can be distinctly ascertained from the written communications without the aid of oral evidence what are the terms of the contract, the memorandum will be sufficient to satisfy the statute.

In Gibson V. Holland I C.P. I, plaintiff was a horse dealer. The defendant authorized one Rooke to purchase a mare of the plaintiff. After the mare had been purchased the defendant refused to pay for her, his defence being insufficient memorandum. One of the papers relied on as constituting the memorandum was a letter written by the plaintiff to Rooke referring to letters which the agent had written, on which the latter had made the contract. Held the letters taken together form a sufficient memorandum.

Letter Repudiating Contract.

A letter written for the purpose of repudiating a contract may constitute a memorandum of it if there is an

admission of the contract and its substantial terms are stated. The letter relied on must in itself contain the terms of the contract, quantity, quality, price of the goods etc. or it must refer to some other paper containing them in such a way as by its own terms to connect itself with said paper.

In Bailey V. Sweeting 30 C.P. 150, the letter was as follows: "In reply to your letter of the 1st. instant I beg to say that the only parcel of goods selected for ready money was the chimney-glasses amounting to 38£ 10s, 6d, which goods I have never received and have long since declined to have for reasons made known at the time &c." Earl J. in his opinion said, "The letter in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney glasses but I decline to have them because the carrier broke them.' Now the first part of the letter is unquestionable a note or memorandum of the bargain. It contains the price and all the substance of the contract and there could be no dispute if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute."

In Cave V. Hastings 7 Q.B. Div 125, an action for the

breach of a contract for the hire of a carriage for more than one year from the date of the agreement, it was proved that the plaintiff agreed to let the carriage to the defendant. A memorandum of the terms of the agreement was signed by the plaintiff but not by the defendant. The defendant subsequently wrote a letter to the plaintiff desiring to terminate the agreement, in which he referred to, "our arrangement for the hire of your carriage" and, "my monthly payment". There was no other arrangement between the parties, to which the expressions of the defendant could have reference ~~except~~ the agreement contained in the memorandum signed by the plaintiff. Held, that the letter of the defendant was so connected by reference to the document containing the terms of the contract as to constitute a memorandum within the statute of frauds.

These decisions have been cited approvingly in numerous cases of recent date both in England and America and this is unquestionably the settled law. The law here, as in numerous other cases seems very inconsistent. Taking the above case for an example, if the defendant had gone to the plaintiff and verbally manifested his intention of terminating the contract he could not have been held because there

would not then have been any signature under his hand, but having written a letter and made reference to, "our arrangement" he is held on his contract there being then, a sufficient note of memorandum to satisfy the statute.

Reference.

In order that collateral papers may be embodied in a memorandum so as to make them a part of the contract, the note or memorandum must clearly point out the writing referred to, so that parol evidence need not be adduced to connect the writings. The papers should on their face sufficiently demonstrate a reference.

Sale by Auction.

An auctioneer is the agent of the vendor alone until the bid is knocked off, when he becomes also the agent of the vendee for the purpose of perfecting the sale, and it is upon the ground of this dual capacity that the memorandum of a sale made by him at the time thereof and before the agency ceases is binding upon both. A memorandum made by an auctioneer in order to be valid, must have been made contemporaneously with the sale, must contain the names of the vendor and

vendee, a description of the property sold, and the terms of the sale, so that, resort to extrinsic evidence will not be necessary, and if aid is required from the posters or advertisements of the sale they must be referred to in the memorandum or they cannot be regarded as a part thereof or used in evidence. No formality is required. It is not expected that the terms of the sale will be set forth with technical precision.

In Baptist Church V. Bigelow 16 Wend. 28 where a pew in a church was sold at public auction and the only memorandum of the sale was an entry made by the auctioneer on a chart or plan of the ground floor of the church, exhibited at the sale of the name of the purchaser and the sum bid by him. Held, the memorandum was not sufficient within the requirements of the New York statute although at the time of the auction, a written or printed advertisement containing the conditions of sale was exhibited and read to the purchaser.

In Talman V. Franklin Supra, the auctioneer attached a letter signed by the owner, which stated the terms of the sale on a page of his book; then made the residue of the entries requisite to constitute a memorandum of the contract and subscribe his name to it. Held, that the letter was to

be taken as a part of the memorandum subscribed by the auctioneer and rendered it sufficient within the statute.

Records of Corporations.

The records of a corporation may contain the terms of a contract sufficient to constitute a memorandum within the statute. The actions and resolutions of a corporate body are ordinarily expressed in the minutes recorded by its secretary or its clerk and subscribed by him in his official capacity. Therefore, when there is sufficient evidence of the terms of a contract and the minutes are signed properly, there is a satisfactory compliance to the statute. For there is some note or memorandum subscribed by the party to be charged thereby.

In Argus Co. V. Albany 55 N.Y. 495 the common council of the city of Albany adopted a resolution that the proceedings of the board should be published in one daily paper to be designated by the board. The Argus was designated. Afterwards the common council awarded the printing to three other papers. The plaintiff protested. It was held that the resolution under which the plaintiff was appointed city printer created a valid contract in writing under the statute

of frauds and entitled the plaintiff to recover the compensation agreed upon for the whole period.

Signature.

The note or memorandum must be signed by the parties to be charged or their agents thereunto lawfully authorized.

The question of signature is one of intention, a question of fact to be determined from the other circumstances of the case. It may be in writing in pencil or ink, or it may be printed. It may be in the body of the writing or at the beginning or end of it. When the signature is out of its usual position, other than at the foot of the instrument, it then becomes a question of intention whether the signature is a valid one or not.

In Bennett V. Brumfit 3 C.P. 31 where a party affixed his name to a memorandum on which was engraved a facsimile of his ordinary signature. Held that the writing was signed within the statute of frauds.

All that is required is that the impression be put upon the paper by the hand of the party signing. In each case whether by pencil, stamp or even initials, it is a personal act of the party and to all intents and purposes a

signing of the document by him.

Signature by one of the Parties.

The Seventennth section of the statute requires the memorandum to be signed "by the parties to be charged". It will be important here to consider the object of the statute. It is entitled "An act for the Prevention of Frauds and Perjuries". Is not the end and object of the statute attained by written proof of the obligation of the party to be charged? He is the party to be charged with a liability and he is to be protected against the dangers of false and oral testimony.

The term parties" in this section is used in connection with the words "to be charged thereby" and does not necessarily include nor can it be construed to include all the parties to the contract. It is on the contrary restricted to such only of those parties as are to be legally ~~to be~~ bound and responsible on the contract.

In Mason V. Decker 72 N.Y. 595, the defendant signed and delivered to the plaintiff an agreement to buy certain corporate stock upon terms specified and the latter agreed by parol to sell. Earl J ., said, " It is claimed on the

part of the defendant that the plaintiff cannot recover on the last agreement because it was not mutual and that there was no consideration expressed in the paper to make the agreement on the part of the defendant binding upon him, for the reason that there was no agreement to sell. But there was an ample consideration for the last agreement. The agreement of the seller to sell need not be in the paper signed by the purchaser. If the purchaser signs an agreement to buy and delivers it to the seller and he agrees by parol to sell upon the terms mentioned in the paper signed by the purchaser there is a binding contract which can be enforced against the purchaser.

Parol Evidence .

It is quite beyond the scope of the present treatise to discuss to any great extent the law of evidence but a brief examination will perhaps make the subject more complete. The question of the admission and rejection of oral evidence to vary and existing written contract has caused an endless amount of litigation and yet the question is far from being settled. The existence of a memorandum presupposes an ante-

cedent parol contract, therefore it would be contrary to all reason to allow oral evidence to be adduced to vary the terms and defeat the very object which the memorandum was intended to guard against. Not only is it contrary to the statute of frauds but to the common law before the statute, to add anything to an agreement in writing, by parol.

But there are certain cases in which it would be unjust not to allow parol evidence to be introduced. It is generally admissible to show that the writing which purports to be a memorandum of the contract is not a record of any antecedent parol contract at all; parol evidence is admissible to show a mistake in reducing the oral contract to writing; and as general rule to show a latent ambiguity.

The question of the admission and rejection of parol evidence is discussed at great length in all the works on evidence and treatises on the statute of frauds. IT ~~is~~ affords a field of constant litigation and dispute. As the subject could not be treated with any degree of thoroughness at this place it has only been alluded to in a brief manner.

